No. 97-1817

In the Supreme Court of the United States

OCTOBER TERM, 1997

SMILAND PAINT COMPANY, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioners are not entitled to judicial review of a proposed rule until completion of the rulemaking process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-5a) is unpublished, but the decision is noted at 122 F.3d 1070 (Table). The district court did not issue an opinion, but its final judgment is reproduced at Pet. App. 1a-2a.

JURISDICTION

The court of appeals entered its judgment on August 27, 1997. The court of appeals denied a petition for rehearing on February 9, 1998 (Pet. App. 6a-7a). A petition for a writ of certiorari was filed on May 11, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Section 183(e) of the Clean Air Act (CAA), 42 U.S.C. 7511b(e), directs the Environmental Protection Agency (EPA) to promulgate regulations or "control technique guidelines" to curb emissions of volatile organic compounds (VOCs) from consumer and commercial products. In accordance with Section 183(e), EPA has prepared a study, filed a report with Congress, and proposed rules or control technique guidelines to reduce VOC emissions from various categories of products. EPA has not, however, issued final rules or control technique guidelines. Nonetheless, petitioners, a group of paint manufacturing companies, filed suit in federal district court challenging the substance of EPA's study, report, and proposed architectural coatings rule. The district court granted summary judgment for respondents. Pet. App. 1a-2a. The court of appeals dismissed petitioners' appeal, ruling that both courts lacked jurisdiction to review the non-final agency action. *Id.* at 3a-5a.

1. The CAA has long regulated industrial and automotive sources of VOC emissions, which contribute to the build-up of ground-level ozone, one of the primary ingredients of "smog." See, *e.g.*, CAA § 111, 42 U.S.C. 7411; CAA § 202, 42 U.S.C. 7521. The 1990 amendments to the CAA, Act of Nov. 15, 1990, Pub. L. No. 101-549, 104 Stat. 2399, instituted several new initiatives to address non-industrial, non-automotive sources of VOC emissions that federal law had not previously addressed.

One of those initiatives is contained in Section 183(e), which requires EPA to begin regulating VOC emissions from consumer and commercial products,

including but not limited to paints, coatings, and solvents. 42 U.S.C. 7511b(e). Section 183(e) requires EPA, among other things, to conduct an informational study on the potential magnitude of the problem, 42 U.S.C. 7511b(e)(2), report the results to Congress, *ibid.*, and develop criteria and issue a timetable for regulation, 42 U.S.C. 7511b(e)(2)(A)(ii) and (3)(A). Once the timetable is issued, EPA is then required to promulgate a series of regulations or control technique guidelines over an eight year period, with each regulation or control technique guideline to focus on reducing VOC emissions from a particular category of products. 42 U.S.C. 7511b(e)(3)(A).

EPA's activities under Section 183(e) are subject to the CAA's procedures for judicial review. Section 307(b)(1) of the CAA vests exclusive jurisdiction in the District of Columbia Circuit to adjudicate challenges to "nationally applicable regulations" and "final actions." 42 U.S.C. 7607(b)(1). Section 307 effectively ensures that there will be an opportunity for judicial review of every one of EPA's final consumer product VOC regulations or control technique guidelines. 42 U.S.C. 7607. The court of appeals' review extends to whether the final regulations are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 42 U.S.C. 7607(d)(9)(A), and whether there were procedural deficiencies in the rulemaking process. 42 U.S.C. 7607(d)(9)(D).

In addition, Section 304 of the CAA contains a citizen suit provision that authorizes any person to bring a civil action in federal district court "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the

Administrator." § 304(a)(2), 42 U.S.C. 7604(a)(2). Section 304 provides a basis for relief from agency inaction in the face of a mandatory duty, see CAA § 304(a), 42 U.S.C. 7604(a) (empowering the district courts to "order the Administrator to perform such act or duty"), but it does not provide a basis for seeking review of the substance of an agency regulation or order, see CAA § 307(e), 42 U.S.C. 7607(e) ("Nothing in [the CAA] shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in [Section 307].").

2. EPA has completed preliminary steps in the Section 183(e) rulemaking process, but has not yet issued any final rules or control technique guidelines. In March 1995, EPA published a six-volume study of emissions of VOCs into the ambient air from consumer and commercial products, see C.A. ER 7:1-4, and transmitted the results to Congress in a 158-page, comprehensive report, see Office of Air Quality Planning and Standards, U.S. Envtl. Protection Agency, EPA-4531/R-94-066-A, *Study of Volatile Organic Compound Emissions from Consumer and Commercial Products: Report to Congress* (Mar. 1995); C.A. ER 7. EPA conducted its study in accordance with the congressional directives contained in Section 183(e)(2). See 42 U.S.C. 7511b(e)(2).

In that study, EPA concluded that VOC emissions from consumer and commercial products have the potential to contribute substantially to the nation's ground-level ozone problem. C.A. ER 7:2-1. EPA also established criteria for regulating various categories of products and explained how it had evaluated each of five factors that Congress instructed the agency to consider in establishing those criteria. C.A. ER 7:4-1

to 4-13. EPA emphasized, however, that neither the study nor the report to Congress constituted final agency action and that the findings contained therein were subject to revision in light of new data, and further refinement of the agency's analyses in connection with the development of regulations or control technique guidelines for consumer and commercial products. See, *e.g.*, C.A. ER 7:2-9, 4-1.

In conjunction with the report to Congress, EPA published in the *Federal Register* a list of categories of products that EPA intended to regulate, in their order of priority. See 60 Fed. Reg. 15,264 (1995). As required by Section 183(e)(3)(A), EPA identified roughly 40 categories of products, which together account for approximately 80% of VOC emissions from consumer and commercial products in ozone non-attainment areas, and divided those categories into four groups in a timetable for regulation. *Id.* at 15,267. Architectural coatings—the product category of concern to petitioners—was placed in the group scheduled for earliest regulation. *Ibid.* EPA noted, however, that its list of categories and schedule for regulation were non-final and could "be amended as further information becomes available or is submitted to the EPA." *Id.* at 15,264.

In June 1996, EPA released a proposed rule to regulate VOC emissions from architectural coatings. 61 Fed. Reg. 32,729 (1996). In the preamble to the proposed rule, EPA reiterated that its previously issued study, report, and schedule for regulation were non-final. *Id.* at 32,731. EPA noted that its decision to regulate architectural coatings was subject to reconsideration in response to public comment and would not become final until EPA actually promulgated a final rule. *Ibid.* EPA provided for a 60-day public

comment period and extended the comment period deadline twice. See 61 Fed. Reg. 46,410 (1996); *id.* at 52,735.

3. On September 10, 1996, petitioners filed the instant action in district court to enjoin EPA from proceeding with its rulemaking. C.A. ER 1:1-52. They invoked the court's jurisdiction primarily under the CAA's citizen suit provisions, CAA § 304(a)(2), 42 U.S.C. 7604(a)(2). Petitioners alleged that EPA failed to comply with various "non-discretionary" statutory requirements in conducting its study and preparing the proposed architectural coatings rule. C.A. ER 1:2-3. Petitioners claimed, for instance, that EPA failed properly to evaluate the five factors that Congress identified in Section 183(e)(2)(B), 42 U.S.C. 7511b(e)(2)(B), as considerations for establishing criteria for regulation. See *e.g.*, C.A. ER 1:33. The government moved for summary judgment, and the district court granted judgment for the government on all claims. Pet. App. 1a-2a.

4. Petitioners sought review of the district court's judgment, but the court of appeals dismissed petitioners' appeal for lack of jurisdiction. Pet. App. 3a-5a. The court of appeals observed that "EPA has not promulgated final rules or otherwise taken any other final action that is reviewable." *Id.* at 4a. The court of appeals explained that, even if EPA had taken final action, Section 307(b)(1) provides for exclusive jurisdiction in the District of Columbia Circuit. *Ibid.* As for petitioners' assertion of jurisdiction under the CAA's citizen suit provision, the court of appeals stated that, while Section 304(a)(2) of the CAA authorizes suit to compel an "act or duty * * * which is not discretionary," 42 U.S.C. 7604(a)(2), petitioners "have not demonstrated that the EPA has

failed to perform any nondiscretionary duty." Pet. App. 4a. The court also noted that petitioners had failed to provide the 60-day notice required by Section 304(a)(2) and that petitioners' other proffered bases for judicial review did not provide a basis for jurisdiction in this case. *Id.* at 5a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with the decision of any other court. EPA intends to promulgate the final architectural coatings rule in the near future, and once the final rule is issued, petitioners' challenge to the proposed rule will become moot. Further review by this Court is therefore not warranted.

1. Petitioners allege that EPA's proposed architectural coatings rule, as well as the study, report to Congress, and criteria and timetable for regulation on which the proposed rule is based, are deficient because EPA prepared them without adequately considering what petitioners describe as "[m]andatory" statutory factors. Pet. 5-9. In petitioners' view, Section 304(a)(2) of the CAA, 42 U.S.C. 7604(a)(2), entitles a citizen to obtain judicial relief from a district court during the course of a rulemaking if the citizen is dissatisfied with the agency's interpretation of its statutory obligations in announcing a proposed rule.

As the court of appeals correctly recognized, petitioners' challenge to the preliminary steps in the Section 183(e), 42 U.S.C. 7511b(e), rulemaking process is not ripe for review until the agency completes its rulemaking process. See *Ohio Forestry Ass'n* v. *Sierra Club*, 118 S. Ct. 1665, 1670 (1998). Section 304(a)(2) allows a plaintiff to challenge agency inaction in the face of a non-discretionary statutory

duty, but it does not allow a plaintiff to enjoin an ongoing rulemaking based on the citizen's disagreement with the agency's interpretation of its statutory duties. Petitioners' approach "would effect a wholesale abrogation" of the ripeness doctrine. *Bennett* v. *Spear*, 117 S. Ct. 1154, 1166-1167 (1997); see also *Texas* v. *United States Dep't of Energy*, 764 F.2d 278, 283 (5th Cir.), cert. denied, 474 U.S. 1008 (1985) ("We have long imposed a ripeness requirement even where the statute authorizing our review did not do so.").

As this Court has explained, the ripeness requirement is designed to

> prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Laboratories v. *Gardner*, 387 U.S. 136, 148-149 (1967). The courts have consistently rejected as premature challenges to informational studies, reports, and proposed rules, which, as here, do not create any legal rights or impose any legal obligations. See, *e.g.*, *Public Citizen Health Research Group* v. *Commissioner, FDA*, 740 F.2d 21, 31 (D.C. Cir. 1984) ("[r]eview of tentative agency positions on substantive questions severely compromises the interests that ripeness and finality notions protect"); *Center for Auto Safety* v. *National Highway Traffic Safety Admin.*, 710 F.2d 842, 846 (D.C. Cir. 1983) (proposed rules generally not ripe for review); *Anaconda Co.* v. *Ruckelshaus*, 482 F.2d 1301, 1305 (10th Cir. 1973) (same). Premature review "denies the agency an op-

portunity to correct its own mistakes and to apply its expertise," *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242 (1980), and risks wasting judicial resources, as "review may now turn out to have been unnecessary." *Ohio Forestry Ass'n*, 118 S. Ct. at 1672.

Postponing review until EPA has completed its rulemaking process would not result in significant "hardship to the parties." *Abbott Laboratories*, 387 U.S. at 149. If petitioners are dissatisfied with the final architectural coatings rule that EPA ultimately adopts, petitioners will be able to obtain judicial review of the final rule under Section 307 of the CAA. See 42 U.S.C. 7607(b)(1); *Ohio Forestry Ass'n*, 118 S. Ct. at 1672; cf. *id.* at 1670 (challenge to agency action unripe for review where plaintiff "will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain"). Section 307(d)(9), 42 U.S.C. 7607(d)(9), which provides a scope of review similar to that provided by the Administrative Procedure Act, 5 U.S.C. 706, grants the court of appeals ample authority to consider substantive and procedural challenges to the final rule. See 42 U.S.C. 7607(d)(9).

2. Petitioners contend that review is warranted in this case to resolve a division of authority among the courts of appeals. Pet. 12-20. According to petitioners, the court of appeals' decision conflicts with decisions of several other circuits which, they assert, "allow immediate challenges to EPA's failures to perform nondiscretionary acts regardless of whether such acts are the preliminary steps in future rulemaking procedures." Pet. 13. No such conflict exists.

None of the cases that petitioners cite supports their contention that a plaintiff may challenge an

agency's formulation of an informational study, report to Congress, or proposed rule through a Section 304(a)(2) suit for failure to perform a nondiscretionary duty. For example, *Sierra Club* v. *Thomas*, 828 F.2d 783 (D.C. Cir. 1987), involved a situation in which the plaintiffs sought to compel EPA to issue a final rule after an allegedly unreasonable delay. The court observed that a plaintiff may bring a citizen suit in district court to *compel* issuance of a final rule where the agency has failed to meet a clear-cut statutory deadline. *Id.* at 791. That decision provides no support for petitioners' attempt to use Section 304(a)(2) to provide judicial review of a proposed rule and *enjoin* issuance of the final rule.

Environmental Defense Fund v. *Thomas*, 870 F.2d 892 (2d Cir.), cert. denied, 493 U.S. 991 (1989), is similarly inapposite. There, the court held that a plaintiff may bring a citizen suit to compel the agency to issue a formal decision whether or not to revise its regulations, where the statute clearly mandates that the agency make such a decision on a periodic basis. *Id.* at 900. The "bureaucratic limbo" that would result from the absence of a formal decision in that situation, *ibid.*, does not exist here, as EPA is proceeding apace with promulgating the final architectural coatings rule. Indeed, petitioners' lawsuit is designed to interfere with and disrupt that process.

Motor Vehicles Manufacturers Ass'n v. *Costle*, 647 F.2d 675 (6th Cir.), cert. denied, 451 U.S. 907 (1981), and *Pennsylvania* v. *EPA*, 618 F.2d 991 (3d Cir. 1980), are also inapposite. They each address circumstances under which Section 304(a)(2) may be used to compel issuance of final regulations in the face of a statutory deadline or a clear-cut statutory duty to do so. Neither stands for the proposition that Section

304(a)(2) may be used to compel EPA to remedy alleged deficiencies in a proposed rule before the agency has considered those alleged deficiencies itself in the course of promulgating the final rule.

Petitioners also contend (Pet. 17-20) that the court of appeals' decision conflicts with the approach taken by the D.C. Circuit in deciding whether allegations of agency inaction are ripe for review. Petitioners' arguments, however, are far off the mark. In *Environmental Defense Fund* v. *Hardin*, 428 F.2d 1093 (D.C. Cir. 1970), for instance, the court of appeals granted a petition to review EPA's failure to act on a request that the agency suspend registration for the pesticide "DDT" on the ground that it posed an imminent public health hazard. The court held that the petition was ripe for review, even though the agency had not formally denied the request, because the facts of that case presented an extraordinary circumstance where agency "inaction is tantamount to an order denying" relief. *Id.* at 1099.

Aside from the fact that *Hardin*'s ripeness determination was premised on a factual scenario that bears no resemblance to the instant case, the *Hardin* decision deals with a fundamentally different type of legal claim than that of petitioners. The claim here is not that EPA has unreasonably delayed or refused to issue its study, report, or proposed rule. Rather, petitioners contend that the study, report, and proposed rule are deficient because they fail to address considerations that, in petitioners' view, must be included. Petitioners are, in effect, simply seeking premature judicial review of non-final agency action. See *Citizens for a Better Env't* v. *Costle*, 617 F.2d 851 (D.C. Cir. 1980) (citizen suit to compel EPA to include provision for sewage sludge in its hazardous waste

regulations was premature where EPA was in the midst of formulating the final regulations).

3. This Court's review is not warranted, in any event, because petitioners' claims under Section 304(a)(2) fail on their merits. As the court of appeals stated, petitioners "have not demonstrated that the EPA has failed to perform any nondiscretionary duty." Pet. App. 4a. Notwithstanding petitioners' characterization of their claims as based on agency inaction, petitioners essentially seek judicial review of the substance of its study, report, and proposed rule.

For example, petitioners' allegation that EPA failed to conduct a study of VOC emissions from consumer and commercial products (Pet. 5) is merely a semantic recasting of a claim that EPA's study, which it prepared and transmitted to Congress, is inadequate. Petitioners' complaint that the study failed to "assess[] the relative reactivities of [different] organic compound species emitted by consumer and commercial products" (*ibid.*) similarly amounts to a quarrel with the agency's exercise of discretion in choosing an appropriate methodology. See *Monongahela Power Co.* v. *Reilly*, 980 F.2d 272, 276 (4th Cir. 1993) (district court must defer to the agency's reasonable interpretation of the statute in determining whether statute imposes a nondiscretionary duty on the agency).

Petitioners are not entitled to substantive review of an ongoing agency rulemaking under the guise of compelling non-discretionary action. The district court's inquiry under Section 304(a)(2) is confined to a "factual determination of whether [performance of a nondiscretionary duty] did or did not occur." *Natural Resources Defense Council, Inc.* v. *Thomas*, 885 F.2d

1067, 1073 (2d Cir. 1989). Section 304(a)(2) does not "permit review of the performance of those [duties]," *Kennecott Copper Corp.* v. *Costle*, 572 F.2d 1349, 1355 (9th Cir. 1978), which Section 307 places in the court of appeals. See *Sierra Club*, 828 F.2d at 792 ("We long ago rejected * * * the convoluted notion that EPA is under a nondiscretionary duty—for purposes of section 304(a)(2)—not to abuse its discretion."). Petitioners' contentions that EPA has not satisfactorily complied with Section 183(e) are accordingly not cognizable until the agency issues a final rule.

4. As a separate matter, an environmental group brought an action against EPA to compel the issuance of either final rules or control technique guidelines regulating architectural coatings and five other categories of products. *Sierra Club* v. *Browner*, Civ. No. 97-1984PLF (D.D.C. filed Aug. 29, 1997). The litigation has led to a tentative settlement, embodied in a proposed consent decree. In accordance with the terms of that proposed consent decree, EPA currently intends to issue the final architectural coatings rule by August 15, 1998. Once the final architectural coatings rule is promulgated, petitioners' challenge to the proposed rule will become moot.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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